

SOUTH DAKOTA OPEN MEETINGS COMMISSION

MINUTES OF MEETING

November 14, 2007
Conference Room 2
Ramkota Inn
Sioux Falls, South Dakota

Members present: John Steele, Chairman, Aurora County State's Attorney; Lisa Rothschadl, Bon Homme County State's Attorney; and Vaughn Beck, Edmunds County State's Attorney. Glenn Brunner, Pennington County State's Attorney and Mark Reedstrom, Grant County State's Attorney. Also present was Diane Best, Assistant Attorney General and Shellie Krog, Paralegal.

The meeting was called to order by Chairman John Steele.

The first matter of business was the oral argument regarding the complaint filed by Raymond Reynolds against the Black Hawk Fire District.

Mr. Reynolds addressed the Commission. He stated there was a lack of attention to detail between the Black Hawk Fire District and Black Hawk Fire Department regarding agendas and notices being posted for the meetings and the lack of posting agendas and notices for meetings, therefore, not being compliant with state law. Also, a subpoena was issued in the presently pending complaint in order to get copies of the 2006 and 2007 meeting minutes of the Fire District, which he stated should be public records and available to anyone. He also stated that what was provided to him were agendas and incomplete minutes, and, that not all the documents requested were provided. The final reason for filing the complaint was the distinction between the Fire Department Board and the Fire District Board.

Chairman Steele asked Mr. Reynolds what the purpose was for having two separate organizations.

Mr. Reynolds stated that the Fire Department was a tax exempt organization with their funding coming from donations, fire insurance premium tax rebates, etc., whereas the Fire District does not. Also the Fire District is subject to annual budget audits.

Mr. Reynolds also stated that the letter sent by the Attorney General's office stated that the reply from the Fire District was also supposed to be sent to him. When he did not receive a copy of a reply by the Fire District, he contacted the Attorney General's office who had to supply him with a copy of the Fire District's reply.

Mr. Reedstrom asked Mr. Reynolds whether his summary of the violations is that the 2006 meeting notice was published without an agenda and that for 2007 no notice or agenda was published.

Mr. Reynolds stated that the 2006 notice published was for the Fire Department meeting, not the Fire District meeting.

Mr. Reedstrom asked Mr. Reynolds what meeting was actually held.

Mr. Reynolds responded that the Fire District was the entity that had the meeting and that without notice being published, the public has no way of knowing that a meeting is taking place.

This concluded Mr. Reynolds' presentation.

Mr. Robert Mallow, Chairman for the Fire District Board addressed the Commission.

Mr. Mallow indicated that the elected members of the Board for the Fire District and the Fire Department are the same. He also stated that the 2007 notice was mailed and he had no idea if it was actually published. Mr. Mallow also indicated that he agreed with Mr. Reynolds in that the notice did not indicate the meeting was for the Fire District. He assured the Commission that all future notices will be sent to the newspaper for publishing. He further indicated that meetings did take place in 2006 and 2007, and that there were people from the community who participated. Mr. Mallow indicated that the Fire District and Fire Department have two separate accounts for funds.

Mr. Brunner asked Mr. Mallow to clarify if the same members serve the Fire District Board and the Fire Department Board and whether or not he chaired both boards. He also asked how often the boards met and if they discussed business involving both boards at those meetings and whether or not the organizations were related to each other. Mr. Brunner further asked Mr. Mallow if one entity provided funding for the other.

Mr. Mallow responded that the same members do serve on both boards and that he chaired both boards. He also indicated that the Fire District met the second Tuesday of every month and, depending on the issues, they do sometimes discuss Fire Department issues. He further indicated that both organizations were related to one another. Mr. Mallow indicated that the Fire District's funding came from the county by submitting a separate budget to the county and the Fire Department received their funds from donations, insurance, and fighting fires. They do not provide funding for each other.

Chairman Steele asked Mr. Mallow if the Fire District funds were used for the Fire Department to buy equipment, supplies, etc.

Mr. Mallow indicated that the Fire District purchases and uses its own equipment and that each entity has their own equipment, which they keep separate inventories for.

Ms. Rothschadl asked Mr. Mallow if the two organizations had the same jurisdiction.

Mr. Mallow indicated that both organizations have the same jurisdiction or boundaries.

Ms. Best asked if the 2007 meeting notice for the Fire District was posted at the fire hall or principal place of business 24 hours in advance of the meeting.

Mr. Mallow indicated that there was no place to post a notice at the fire hall and that notice is sent to the newspaper for publishing not less than 7, but not more than 15, days in advance of the meeting.

Ms. Best asked Mr. Mallow if he was indicating that since the newspaper notice was published well in advance of 24 hours, no notice was required to be posted at the principal place of business.

Mr. Mallow responded that he wasn't sure.

Chairman Steele made a clarification that Mr. Mallow assumed the Fire District legislation is the only thing pertinent and that it is separate from the open meetings law and that there is nothing separate about posting in the Fire District.

Mr. Mallow asked if the Fire District needed to post a meeting notice.

Chairman Steele indicated they would have to research the issue of whether the Fire District legislation preempts open meetings laws.

Mr. Beck asked Mr. Mallow if the notices sent to the Commission were the same ones sent to both newspapers for publishing. He also indicated that the notices the Commission received and what were published appear to be different and asked who was responsible for the submission to the newspaper and whether or not they received billing notices for the publication.

Mr. Mallow reviewed the documents and indicated that those were the notices that were supposed to be sent to the newspapers, but that they were not the notices that appeared in the newspaper. He also stated that it was his responsibility to submit them to the newspaper for publishing but that he was absent when the notices were sent to the newspaper and a different notice was sent. He further indicated that they received a billing notice for 2006 but not 2007.

Ms. Rothschadl indicated that the notices were misleading because they indicate the meeting is for the Volunteer Fire Department Tax District, and wanted clarification on which organization the notices were actually for.

Mr. Mallow responded and said they were for the Black Hawk Fire District.

This concluded Mr. Mallows testimony.

Chairman Steele asked Mr. Reynolds if he had any rebuttal testimony.

Mr. Reynolds stated that he had no disagreement with any of Mr. Mallow's comments. He further wanted to clarify the difference between the Fire Department and the Fire District. He indicated that the Fire District could levy taxes on property wherein the Fire Department cannot. He further stated that the Fire District pays capital outlay expenses and the day to day operating expenses for the Fire Department. The Fire Department funds are used to purchase equipment and the like.

Chairman Steele stated that there seemed to be no dispute of the fact that for 2007 no notice was published for the meeting. He then asked Mr. Reynolds if the complaint for the 2006 notice was in error because it stated it was for the Fire Department when it was actually a meeting for the Fire District and whether he thought anyone was confused by that fact.

Mr. Reynolds stated that there had been some confusion on what the difference was between the Fire District and the Fire Department. He then explained that at the Fire Department meetings, financial issues would have been discussed, but at the 2006 meeting the only discussion involved the Fire District. He stated that since an agenda was not published for the 2006 meeting, there was no indication that there would be an election of board members.

This concluded the rebuttal testimony of Mr. Reynolds.

The next matter of business was the oral argument regarding the complaint filed by Mark S. Roby against the City of Watertown.

Mr. Roby addressed the Commission. He stated that public records are in the database of the South Dakota Newspaper Association's website free of charge. Mr. Roby stated that the complaint was regarding the City Finance Committee neglecting to publish a notice of their August 10 meeting. Mr. Roby stated secondly, that he believed a quorum of the City Finance Committee was present at the meeting and that official action was taken at that meeting. He believes that the City Finance Committee comprises a public body created by an ordinance of the

City of Watertown, and is therefore subject to the open meetings law requirements. As a result of no notice being published, the Utilities were unable to attend and discuss a proposed cash transfer involving utilities. Mr. Roby explained that committees are created to do the legwork and then send a recommendation to the City Council for action. Third, Mr. Roby believes that a quorum of the full council was at the meeting. He indicated that 5 of the 10 council members were present for the entire meeting and that a 6th council member was there at the beginning of the meeting and asked to leave. He believes the 6th council member was asked to leave so they would not violate the full quorum requirement. He stated that the City Finance Committee has established bylaws so he feels they are a public body and should have to post agendas and meeting notices.

Mr. Beck asked Mr. Roby to clarify whether the committees were established by ordinance and Mr. Roby indicated they were. Mr. Roby further stated that since 5 members of the city council were there plus the mayor and a 6th council member, who was later asked to leave before any action was taken, he feels that the quorum was met by having 51 or 51.1 percent of the council present.

Mr. Brenner, asked Mr. Roby whether he thought the City Finance Committee was established by law as a governing body and whether that was the basis for claiming it was subject to the open meeting laws. Mr. Roby indicated that was correct.

Chairman Steele then inquired whether there was a quorum of the city council present anyway. Mr. Roby again indicated he felt that was correct. Mr. Roby then stated that 6 voting members were there for the entire meeting (although the mayor only votes if there is a tie), and that creates a possible conflict.

Mr. Beck asked for clarification on whether the finance committee is established by law. Mr. Roby stated that it was a city ordinance.

Chairman Steele asked Mr. Roby what statute he referred to other than 1.51 because he read the open meeting law and it stated it applied to boards, commissions, etc. predicated by statute, which is different from created by law and that Watertown City ordinance was not a statute.

Mr. Roby replied that Watertown's provision was in its home rule charter and, as such, is a law.

Chairman Steele indicated that he was not sure that the home rule situation meant the City Finance Committee was established by statute or that it was created by statute.

A question was asked as to whether the committee actually voted. Mr. Roby stated that the minutes indicated that on this particular item, they did vote with only one Alderman dissenting.

Mr. Reedstrom then stated that in an aldermanic form of government there is a definition of a quorum and it requires more than a majority of alderman. Mr. Roby stated that the mayor is there for the entire meeting and can vote if there is a tie.

Mr. Roby stated that the final point is that they did not post an agenda and should have.

Mr. Brenner asked if the mayor voted at the committee meeting. Mr. Roby indicated that the minutes did not indicate the mayor voted.

Mr. Roby then asked the mayor, who was in attendance, if he voted. The mayor conferred with Mr. Stanton Fox and indicated that he did vote. Mr. Roby indicated that it was then a 5-1 vote.

Mr. Roby stated he was on the planning commission and that they post their agendas and all minutes are also posted.

Ms. Rothschild asked Mr. Roby if all committees consist of 5 members. Mr. Roby indicated that the public works, safety and city finance committees do, but he was not sure about the parks and recreation committees, and that only one alderman serves on the adjustment and planning commission.

This concluded Mr. Roby's testimony.

Mr. Stanton Fox, Watertown City Attorney, addressed the Commission. Mayor Paul Fox was also present. Mr. Fox indicated the Finance Committee regularly meets on the third Tuesday of every month at 1:30 p.m. He further stated that various committees are composed of 5 alderpersons and the mayor. Two alderpersons are chosen from 5 wards with the mayor being elected at large. Mr. Fox also stated that Watertown is governed by home charter and is aldermanic. He indicated the Finance Committee's chair is the finance officer and that he gave notice to each committee member of the special date and time of the finance committee meeting. The timing of the meeting was based largely on the adoption of the annual appropriation ordinance of the city council and not to keep the utilities from the meeting. The Finance Officer and mayor had met for several weeks with the department head to discuss fiscal year 2008 budget requests. The Finance Officer projected to the mayor that the budget would need to be cut by more than \$820,000 and the general fund by \$687,000, and, in light of the anticipated shortfall, the special meeting was scheduled to discuss the possible ways to eliminate it which included increasing the annual contribution from municipal utilities. For example, Watertown has two cable companies who provide a franchise fee to the City of Watertown. So, that is one thing they were going to consider.

Mr. Fox stated that it appeared Mr. Roby had four questions; was an official meeting of a public body held, was official notice required, was a quorum present, and was any official action taken. To summarize existing law, South Dakota statutes make clear that an official meeting of a public body occurs when a quorum is present and can actually conduct business. In Watertown's case, that would be 6 alderpersons, which Mr. Roby alluded to, as state law defines a majority of aldermen elected as a quorum. At the August 10 meeting only 5 council members answered roll call so a quorum was not present. A 6th alderperson was at the city hall paying his utility bill. When the 6th member found out a special finance committee meeting was being held, he walked with another alderperson upstairs as he visited with her. Mr. Fox stated that he was notified by the other people present that the meeting was about to start and the alderman who was there to pay his utility bill stated he was leaving as he was not initially notified of the meeting and that would make 6. When the meeting was officially called to order, there were only 5 members present. With only 5 alderperson at this meeting no official business could be conducted. They could make a recommendation to the full city council and that is what they did. South Dakota law clearly states that an alderman form of government, "any report from the committee to the council shall be deferred for final action thereon, to the next regular meeting of the council." This committee process has existed for decades. The primary reason the mayor is a standing member of the three committees, with the ability to vote, is to ensure the public would know the mayor's position on any issue that comes before the committees. The City of Watertown feels its committee process is consistent with state law and supports their position with a prior Attorney General opinion, 89-08. Former Attorney General Tellinghuisen stated that where there is an absence of additional legislative or judicial guidance on the matter, an official meeting of a public entity is when a majority or quorum of the body is present for official business within the jurisdiction of the board commission or agency. Mr. Fox concluded that the City of Watertown urges that the Commission find as both a matter of fact and law the meeting on August 10 was not an official meeting, did not consist of a quorum of members, and was not subject to the provisions of South Dakota law requiring public notice.

Mr. Beck asked Mr. Fox if the City Finance Committee was its own public body, wherein Mr. Fox stated he would not concede that it was.

Chairman Steele asked Mr. Fox if the 6th alderman who was briefly present at the meeting was a member of the City Finance Committee or if he was entitled to vote at the meeting, and Mr. Fox stated that he was not. He further stated that the meeting was scheduled by email on short notice and all committee members were able to attend to discuss the projections and determine what they should do.

Mr. Brenner asked Mr. Fox how long the City Finance Committee had been in existence. Mr. Fox replied since the Nixon-Eisenhower administration and that he has been there for 6 years and several others were there prior to that. He stated that the three standing committees (City Finance, Public Works and Parks) meet on a monthly basis.

Mr. Brenner also asked Mr. Fox if the committees were required by city ordinance and if they all contained less than a quorum of members. Mr. Fox stated that they all contained 5 council members and the mayor.

Mr. Brenner then asked if it would be fair to assume that the committees were designed to avoid having to meet the requirements of the open meetings law and do business to bring to the city council. Mr. Fox responded by stating for the last 3-4 years those committees had agendas on the website and were not avoiding the public. He also said that the committee's are there to give the council direction for them to take action on. His example was a construction project where a major change that would be costly was announced by the onsite personnel and they needed direction or the project would come to a stop until a decision was made. That would be one reason a committee would have to meet on short notice. It is not to circumvent the law.

Mr. Brenner asked Mr. Fox if any official action was taken at those meetings and Mr. Fox responded that it was only to get a recommendation to the council.

Ms. Rothschadl stated that it appeared the ultimate question was whether or not the committees were subject to open meeting laws. Mr. Fox stated he did not believe they were subject to the open meeting laws because a majority or quorum of aldermen are not present at the committee meetings and they do not have the ability to conduct official business. The mayor's vote is just a symbolic vote, so no official business can ever occur.

Ms. Rothschadl asked Mr. Fox about the agendas being posted on the webpage for the last 3 to 4 years was a service to community so they could see what was happening. Mr. Fox replied that they received comments from the public that too much information was posted on the website and have adjusted it over time. He also stated that in the 6 years he's been with the City that less than 10 percent of meetings are attended by anyone other than department heads and committee members.

Mr. Beck asked if anyone could come and listen in on the meetings and if they did full minutes of the meetings. Mr. Fox stated that council meetings were broadcast on public tv, but that the committee meetings were not broadcasted.

Ms. Rothschadl asked if the committee minutes were published. Mr. Fox replied that South Dakota law required the council minutes be published and the city published both the council minutes and the minutes for the committees to the city's website.

Mr. Reedstrom asked Mr. Fox if it was his position that the committee is not a public body because they could take no official action and only make recommendations, to which Mr. Fox replied that the law was clear that a public body is one that can actually get something done.

Mr. Reedstrom further asked Mr. Fox about the Attorney General opinion. Did it reference discussion of official business or was it the ability to take official action? Mr. Fox stated he thought the key was the presence of a quorum. You had to have 6 people there or no official business can be conducted.

Mr. Reedstrom stated that 6 people were there and that would make a quorum. Mr. Fox replied that 5 alderman were there and the mayor.

Chairman Steele characterized the comments as follows: If the City Finance Committee is a public body then Mr. Roby's argument is that the issue to decide is whether or not the City Finance Committee is itself a public body subject to open meetings law. Otherwise, if the City Council itself is at issue, the issue is whether there was a quorum at all of that body.

Mr. Brenner commented that hypothetically if the 6th member had stayed and they discussed business, the quorum of the whole city council would still have met, even if they had not taken any action. Mr. Fox responded that if the 6th member had stayed then it would have been an open violation of the open meeting law.

This concluded Mr. Fox's testimony.

Chairman Steele asked Mr. Roby if he had a rebuttal testimony.

Mr. Roby referred to a brochure published by the Attorney General's Office, and counties and cities. It states that meetings of boards and commissions created by law are subject to open meetings laws. He referred to the committees being created by the City of Watertown, which is also a home rule charter community, therefore being a law of the City. The meeting should have been subject to open meetings requirements. The committee did take action. Otherwise, why was there a 5-1 vote and why did they make a recommendation to the city if no action was going to be taken to raise the utility rates? The 6th alderman, who was a member of the utilities board prior to becoming a city council member, is also a liaison for the city council. They should have posted an agenda and they violated South Dakota's open meeting laws.

Mr. Brenner stated to Mr. Roby that throughout his testimony he has suggested the city council has conducted their meetings is to avoid the open meeting laws. He suggested that perhaps this indicated they were aware of the laws and did this so they would not violate the open meeting laws. Mr. Roby responded by saying yes. He further stated that all the city finance, safety committee and public works agendas had been posted on the website except this one.

Ms. Best asked whether, if an ad hoc task force had been created, it would be required to comply with the open meeting law. Mr. Roby responded that this committee is set by ordinance. He stated that he is on several boards and usually when a committee brings something to the full board as a recommendation, the board usually goes along with it.

This concluded Mr. Roby's rebuttal testimony.

Chairman Steele thanked the presenters and stated the Commission would consider the matters fully and it would be assigned and an opinion out as soon as possible.

Ms. Best gave a status report on the pending cases.

Chairman Steele assigned the Brown County decision to Ms. Rothschadl. He assigned the Watertown decision to Mr. Beck. He assigned the Black Hawk Fire District decision to Mr. Reedstrom. The Lawrence County decision was discussed, but not acted upon. Chairman Steele asked that it be circulated again.

The next item of business was a decision for Arcade Township. Chairman Steele asked that a motion be presented to approve the draft decision of Arcade Township as prepared by Vaughn Beck. Brenner moved to approve the decision, which was seconded by Reedstrom. All voted in favor of the decision.

A short recess was taken to review the City of Tripp decision. Mr. Brenner left during the break.

Chairman Steele asked that a motion be presented to issue the decision regarding the City of Tripp as drafted. Beck moved to approve the decision, which was seconded by Reedstrom. All voted in favor of the decision.

Chairman Steele asked that a motion be presented to issue the decision regarding the Board of Regents, along with any later comments or dissent by Mr. Brenner if he makes any such submissions. Rothschadl moved to approve the decision, which was seconded by Beck. All voted in favor of the decision.

The next order of business was the minutes of the November 15, 2006, meeting. Chairman Steele asked if there were any additions, corrections, or changes to the minutes. There being none, the minutes were unanimously approved as written.

The final order of business is election of the Chairman. Mr. Reedstrom nominated John Steele. Ms. Rothschadl seconded. Mr. Reedstrom made a motion to cease nominations, and Mr. Beck seconded that motion. All voted in favor of John Steele as Chairman for the next year.

Mr. Reedstrom made the motion to adjourn, which was seconded by Rothschadl.

Meeting adjourned.



John R. Steele, Chairman
South Dakota Open Meetings Commission